U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 8, 1997

Case No.: 96-INA-00043

In the Matter of:

ESSEX CATHOLIC HIGH SCHOOL,
Employer

On Behalf Of:

RONALD ISIDORE,
Alien

Appearance: Julie E. Lynwander, Esq.
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 28, 1994, Essex Catholic High School ("Employer") filed an application for labor certification to enable Ronald Isidore ("Alien") to fill the position of Teacher (AF 9). The job duties for the position are, "Teach Biology, General Science to male high school students. Coach Varsity Tennis." The requirements for the position are a Bachelors Degree and two years of experience in the job offered.

The CO issued a Notice of Findings on July 5, 1995 (AF 70-72), proposing to deny certification on the grounds that the Employer had rejected U.S. applicants Nicholas D'Adams, Peter Santangelo, Rhon Reynolds, Timothy Amann, and Ricardo Zamora for other than lawful, job-related reasons in violation of 20 C.F.R. §§ 656.21(b)(2), 656.21(b)(6), 656.24(b)(2)(ii), and 656.20(c)(8). The Employer was required to document that these candidates were rejected for lawful, job-related reasons. The CO also found that the Employer had failed establish that it recruited U.S. applicant Marcia Owens in good faith in violation of § 656.20(c)(8). The Employer was required to document its good-faith recruitment efforts regarding this applicant.

In its rebuttal, dated July 19, 1995 (AF 73-76), the Employer contended that the U.S. applicants were lawfully rejected for not possessing the "required expertise" in the areas of Biology, General Science and Tennis. The Employer further contended that U.S. applicant Timothy Amann was hired in February 1995 to teach English, and Marcia Owens did not furnish a telephone number so she could only be reached by letter (AF 76). The Employer submitted a copy of the letter to Ms. Owens and a copy of her resume (AF 73-74).

The CO issued the Final Determination on July 27, 1995 (AF 77-80), denying certification because the Employer had rejected a number of U.S. applicants for other than lawful, job-related reasons. The CO also found that the Employer had failed to adequately document that it had recruited one U.S. applicant in good faith.

On August 31, 1995, the Employer requested review of the denial of labor certification (AF 81-102). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Discussion

The regulations provide in § 656.21(b)(6) that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 87-INA-161 (Dec. 7, 1988) (*en banc*).

Although the regulations do not explicitly state a "good faith" requirement in regards to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-670 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are able, willing qualified, and available to perform the work. 20 C.F.R. § 656.1.

Regarding good-faith recruitment, the resume of U.S. applicant Marcia Owens failed to list her phone number. In rebuttal, the Employer contended it had made a good-faith attempt to contact Ms. Owens, and submitted a copy of a handwritten note to Ms. Owens requesting that she contact the Employer for an interview (AF 74). This note was apparently sent by regular mail, as the record contains no certified mail receipts. Reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. *Diana Mock*, 88-INA-225 (Apr. 9, 1990). Labor certification is properly denied where interview letters are sent by regular mail and not certified mail which would enable the employer to document receipt by U.S. workers. *Eckstein Associates*, 93-INA-134 (Mar. 31, 1994); *British Thermal Systems, Ltd.*, 91-INA-274 (Jan. 6, 1993); *Garmen Assoc.*, 91-INA-143 (July 14, 1992).

Based on the foregoing, we find that the Employer has failed to adequately document that it recruited U.S. applicant Marcia Owens in good faith, and that the CO's determination must be affirmed for this reason alone.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.